SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted] 92

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF [redacted],

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, [redacted]

PETITION FOR WRIT OF [redacted] TO THE UNITED STATES [redacted] FOR THE [redacted] SUPPORT [redacted]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER,

PETITIONER, AND APPELLEE BELOW

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

RESPONDENT, AND APPELLANT BELOW

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved

This is a civil action that originally was instituted in the Circuit Court of Henry County, Virginia, by William M. Mitchell, Administrator of the Estate of Kit C. Koger,

hereinafter called the "plaintiff", against New England Mutual Life Insurance Company, hereinafter called the "defendant", and removed by said defendant to the federal court upon the ground of diversity of citizenship. (R. 1).

A final order was entered in the District Court for the Western District of Virginia, by which order a judgment was entered in favor of the plaintiff on the pleadings for the face amounts of two life insurance policies. From this judgment an appeal was taken by the defendant to the United States Circuit Court of Appeals for the Fourth Circuit, which reversed the judgment appealed from. (R. 11).

The petitioner alleged in the pleadings that on July 13, 1938, the defendant issued to the petitioner's decedent two life insurance policies, one in the face amount of $5,000.00 and the other in the face amount of $10,000.00; that the two policies were identically worded except as to the amounts payable and premiums thereon; that the necessary premiums were paid on said policies; that the insured died from accidental causes on August 30, 1939; and that due and sufficient proof of such death was made to the defendant. (R. 4).

After the case had been removed to the District Court, the defendant filed its answer and asserted that the insured committed suicide by shooting himself through the chest with a shotgun and that suicide more than one year and less than two years after the issuance of the policies constituted complete defense due to accident. (R. 7).

The plaintiff moved the court for a judgment on the pleadings to the extent of $15,000.00 the face value of the life insurance contracts on the following grounds:

(1) The defendant's suicide clause was not a limitation of liability or exclusion of death by suicide from the coverage of the policy but on the contrary provided for a forfeiture and hence it did not comply with Section 4228 of the Code of Virginia, and

(2) The suicide clause in defendant's policies is inconsistent and irreconcilable with defendant's incontestable

clause and such conflict should be resolved against the defendant so as to preclude it from asserting the defense of suicide. (R. 10).

The defendant contended that its suicide clause did comply with the provisions of Section 4228 of the Virginia Code in that it constituted a limitation of liability rather than a forfeiture and as it was a limitation of liability it did not conflict with and was not affected by the incontestable clause.

The suicide and incontestable clauses as they appear in the policies provide as follows:

> "If the Insured, whether sane or insane, shall die by his or her own hand or act within two years from the date thereof, this Policy shall be void and shall have no value; but in such event the Company will return any premiums paid.
>
> "This Policy shall be incontestable after it has been in force for a period of one year from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement annexed hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident." (R. 11).

The applicable Virginia Statute which is Section 4228 of the Code of Virginia as amended provided as follows:

> "DEFENSES OF SUICIDE AND DEATH BY LEGAL EXECUTION IN ACTIONS ON LIFE INSURANCE POLICIES: WHEN POLICIES INCONTESTABLE: EXCEPTIONS.—In any action, motion or other proceeding on a policy of life insurance hereafter issued to any person residing in this State at the time of issuance thereof, or which is otherwise subject to the laws of this State, to recover for the death of such person, it shall be no defense that the insured committed suicide, or was put to death by execution under

the law; provided, however, that if there shall be an express provision in the body of such policy limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act (whether sane or insane), such provision shall be valid but the insurer shall be obligated to return, or pay, at the least, the amount of the premiums paid on account of such policy. Nor shall such policy be contestable for any cause after it shall have been in force during the lifetime of the insured for one year from its date, except for nonpayment of premiums and except to violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war; provided, however, that in the event of a misstatement of age, the amount to be paid by the insurer shall be the amount of insurance which the premium paid would have purchased at the true age of the insured. (1916, p. 168; 1926, p. 372; 1932, p. 458)"

The question involved in this case is as follows:

Under the law of Virginia, is the defense of suicide available to an insurance company in an action brought by insured's administrator on a policy of life insurance which has been in effect more than one year and which contains the suicide and incontestable clauses as set out above?

II

Reasons Relied on for Allowance of the Writ

1. The decision of said Circuit Court of Appeals is a decision involving an important question of Virginia law and decided in a way probably in conflict with applicable Virginia law as determined by the highest appellate court of that state in that the holding of the Circuit Court of Appeals to the effect that the present litigation does not involve a question of a contest of the policies here in question but on the other hand involves a question of limited liability or exclusion of risk is in conflict with the decision of the Supreme Court of Appeals of Virginia as determined in *United Security Life Insurance & Trust Com-*

pany v. *Massey*, (1932, 1933) 159 Va. 832, 164, S. E. 529, 167 S. E. 248, 85 A. L. R. 306.

2. The decision of said Circuit Court of Appeals is in any event in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Badger* v. *Hoidale*, (C. C. A. 8th) 88 Fed. (2d) 208, 109 A. L. R. 798, in that even if it be held that *United Security Life Insurance & Trust Company* v. *Massey*, supra, "is not a precise adjudication of the question here involved", nevertheless it must be conceded that the applicable language of the Massey case is certainly considered dictum, yet it has been ignored in the decision of the pending case notwithstanding a contra holding in *Badger* v. *Hoidale*, supra.

3. The decision of the said Circuit Court of Appeals is a decision of a Federal question probably in conflict with an applicable decision of the Supreme Court of the United States in that if it be conceded that *United Security Life Insurance & Trust Company* v. *Massey*, supra, is not an exact decision of the question here involved, nevertheless that opinion insofar as it is here material must be regarded as considered dicta and the opinion and the decision of the said Circuit Court of Appeals does not give deference to that opinion and is, therefore, in direct conflict with the holding of the Supreme Court of the United States in *Hawks* v. *Hamill* (1933) 288 U. S. 52, 53 S. C. R. 240, 77 L. Ed. 610.

4. The decision of said Circuit Court of Appeals is a decision of another Federal question probably in conflict with applicable decisions of the Supreme Court of the United States in that said Circuit Court of Appeals has utterly ignored and refused to follow the holding of said Supreme Court in *West* v. *American Telephone & Telegraph Company* (1940) U. S. , S. C. R. , 85 L. Ed. (Advanced Opinions) 146, to the effect that "it is the duty of" a Federal court in cases where jurisdiction rests exclusively on diversity of citizenship "to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule however superior it may appear from the viewpoint of general law".

5. If we have misapprehended the effect of *Hawks* v. *Hamill*, supra, and *West* v. *American Telephone & Telegraph Company*, supra, then we say that the decision of the said Circuit Court of Appeals in holding that it is not bound by *United Security Life Insurance & Trust Company* v. *Massey*, supra, involves an important question of Federal law, to-wit: The extent to which a Federal court sitting in diversity of citizenship cases is bound by considered dicta of the local courts and to what extent such Federal court may rely upon such considered dicta as available data for the purpose of determining the local law which question if not already decided by the Supreme Court of the United States should be settled by said Supreme Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 4739, New England Mutual Life Insurance Company, Appellant, v. William M. Mitchell, Administrator of the Estate of Kit C. Koger, Appellee," to the end that this cause may be reviewed and determined by this court as provided for by the statues of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated May 14, 1941.

WILLIAM M. MITCHELL,
ADMINISTRATOR OF KIT C. KOGER, *dec'd.*,

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Martinsville, Virginia

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